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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO CALDERON,

Defendant and Appellant.

B267196

(Los Angeles County
Super. Ct. No. NA094774)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mark C. Kim, Judge. Modified with directions in part and affirmed in part.

Murray A. Rosenberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Susan
Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for
Plaintiff and Respondent.

Defendant Alejandro Calderon appeals from the judgment entered following a jury trial that resulted in his conviction of two counts of assault on a peace officer with a semiautomatic firearm (Pen. Code, § 245, subd. (d)(2); counts 4 and 5),¹ one count of shooting at an occupied vehicle (§ 246; count 6) and one count of conspiracy to commit a crime (§ 182, subd. (a)(1); count 8). The jury found true the allegations that defendant personally used and intentionally discharged a firearm in the commission of the counts 4, 5 and 6 offenses (§ 12022.53, subds. (b) & (c)) and personally used a firearm in the commission of the count 8 offense (§ 12022.5, subd. (a)).

The trial court sentenced defendant to a total of 36 years in prison for the two assault convictions and accompanying section 12022.53 firearm enhancements. The court imposed the midterm of five years for the count 6 conviction plus the midterm of four years for a section 12022.5 enhancement, but stayed those terms pursuant to section 654. The court also stayed the section 12022.53, subdivisions (b) and (c) enhancements. The court imposed the midterm of seven years for the count 8 conspiracy conviction plus the midterm of four years for the section 12022.5 enhancement. The court ordered the seven years for the count 8 conspiracy conviction to run concurrently to the sentences for the assault convictions. The court stayed the section 12022.5 enhancement term pursuant to section 654.

Defendant's contentions on appeal all relate to his sentence. He contends the section 12022.53, subdivisions (b) and (c) enhancements to count 6 must be stricken because they are not authorized by law and also contends the seven-year sentence for his count 8 conspiracy conviction is not authorized by law and cannot stand. Respondent agrees with both of these

¹ Further undesignated statutory references are to the Penal Code.

contentions. Defendant further contends his concurrent sentence for his conspiracy conviction is unlawful and must be stayed pursuant to section 654. Respondent does not agree. All of defendant's contentions are well taken, and we order his sentence corrected as set forth in more detail in our disposition.

BACKGROUND

On February 7, 2013, Francisco Valdez reported that his Toyota Corolla had been stolen from in front of his house. On February 13, 2013, Los Angeles Police Department Officers Enrique Gayosso and Jose Arranaga were on patrol in their police vehicle when they observed the stolen Corolla speeding on Bay View Street in Wilmington.

Officer Arranaga began a pursuit of the Corolla. Officer Gayosso activated the lights, siren and video camera on their vehicle. The Corolla accelerated. At some point early in the pursuit, the officers heard gunshots. They then saw muzzle flashes from the vicinity of the Corolla. Officer Gayosso requested and received backup assistance from other officers.

The pursuit of the Corolla lasted about four to nine minutes and covered about three miles. It ended when the Corolla entered a park and crashed into a tree. Defendant and the driver fled on foot.

Officer David Shelton and his partner Officer Brent Riederich, who were providing backup assistance, pursued defendant as he fled on foot, eventually catching him. Officers Riederich and Shelton searched defendant and discovered a .40-caliber semiautomatic handgun and 35 live rounds for the handgun. Fourteen spent .40-caliber casings were recovered along the pursuit route. Two additional casings were recovered from inside the Corolla.

DISCUSSION

A. The Count 6 Firearm Enhancements Must Be Stricken

Defendant contends the jury's true findings on the section 12022.53, subdivisions (b) and (c) firearm allegations for count 6 must be stricken because those subdivisions do not apply to a conviction for shooting at an occupied vehicle. Respondent agrees. They are correct.

Subdivisions (b) and (c) of section 12022.53 provide enhanced punishment for "any person who, in the commission of a felony specified in subdivision (a)," personally uses or intentionally discharges a firearm. Defendant was convicted in count 6 of violating section 246. That offense is not one of the felonies specified in subdivision (a).² The true findings must be stricken.

At the sentencing hearing, the trial court imposed and stayed a third firearm enhancement on count 6, pursuant to section 12022.5, subdivision (a). The abstract of judgment reflects this enhancement. Although the section 12022.5 enhancement was alleged in count 6 of the second amended information, it was not listed on the verdict form for count 6 and so not found true by the jury. Even without this flaw, however, the enhancement would have to be stricken. A section 12022.5, subdivision (a) enhancement may not be applied to the crime of discharging a firearm at an occupied vehicle in violation of section 246. (*People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2.)

² The specified felonies are violations of sections 187, 203, 205, 207, 209, 209.5, 211, 215, 220, subdivision (d) of section 245, 261, 262, 264.1, 286, 288, 288.5, 288a, 289, 4500, 4501, 4503. (§ 12022.53, subd. (a)(1)-(16).) In addition, section 12022.53 applies to any felony punishable by death or imprisonment in the state prison for life. (§ 12022.53, subd. (a)(17).)

B. The Seven-Year Term for Count 8 Is Unauthorized

Defendant contends the court's sentence of seven years for the section 182, subdivision (a)(1) conspiracy conviction is unauthorized and must be reduced to two years in county jail. Respondent agrees the seven-year sentence is not authorized by law, but contends we should remand the matter for resentencing. We reduce the sentence for conspiracy to two years in state prison.

Punishment for a conspiracy conviction depends on the target crime. (§ 182, subd. (a).) The only target crimes which specify a midterm of seven years are crimes "against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States." (§ 182, subds. (a) & (a)(6).) Defendant was not charged with such crimes.

Defendant was charged with conspiracy to commit a crime in violation of section 182, subdivision (a)(1). The trial court instructed the jury that the target crime for the conspiracy charge was evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a). Defendant's conviction is thus "punishable in the same manner and to the same extent as is provided for the punishment of that [target] felony." (§ 182, subd. (a).)

A violation of Vehicle Code section 2800.2 is punishable by "imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year." (Veh. Code, § 2800.2, subd. (a).) Defendant contends section 1170, subdivision (h) controls punishment for Vehicle Code section 2800.2 and so "imprisonment in the state prison" is actually a term of 16 months, two years or three years in county jail. Section 1170, subdivision (h) does not apply to Vehicle Code section 2800.2. (*People v.*

Butcher (2016) 247 Cal.App.4th 310, 318-324.) Thus, “imprisonment in the state prison” means a term of 16 months, two years or three years in state prison. (§ 18, subd. (a).) Accordingly, we reduce the sentence to the midterm of two years in state prison.

C. The Count 8 Sentence Must Be Stayed

Defendant contends his evasion, assault and shooting at an occupied vehicle offenses were part of one continuous course of conduct with one objective, which was to evade arrest by the officer pursuing him. The trial court stayed sentence on the shooting at an occupied vehicle conviction. Defendant maintains section 654 requires a stay of his sentence for evasion as well.

1. Law

Section 654 bars multiple punishments for convictions arising out of an indivisible course of conduct committed pursuant to a single criminal intent or objective. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Section 654 does not bar multiple punishment for multiple objectives in an indivisible course of conduct. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. . . .’ [Citation.]” (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The issue of whether a defendant harbored a single or multiple objectives during a course of criminal conduct is a factual question for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) We review this

determination for substantial evidence, and presume in support of the court's conclusion the existence of every fact the court could reasonably have deduced from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

2. Analysis

The trial court did not make any express findings about defendant's objectives in committing the various offenses. The only explanation the court gave for any of its sentencing choices came at the end of the sentencing hearing, when the court stated, "I am choosing consecutive as to counts 4 and 5 because it involved two different individuals and two different conduct." The court's imposition of a concurrent term for count 8 is, however, "treated as an implied finding that the defendant bore multiple intents or objectives, that is, as a rejection of the applicability of section 654. [Citations.]" (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.)

Generally, when a defendant's initial crime is the escape (here, evasion), a crime such as an assault committed solely to facilitate the escape involves the same intent and objective. (See, e.g., *People v. Chacon* (1995) 37 Cal.App.4th 52, 66 [convictions for aggravated kidnapping and escape; sentence for lesser crime of escape stayed under section 654 because sole intent and objective of kidnapping was to effect escape]; *In re McCoy* (1968) 266 Cal.App.2d 739, 740 [multiple sentences for robbery and escape improper under section 654 where robbery of prison employee accomplished for sole purpose of effecting escape].)

That is what the evidence shows here. Defendant began shooting after the pursuit started and continued to flee after his shots missed their targets. When his car crashed into a tree and was apparently disabled, defendant immediately exited the car and fled on foot. Thus, the evidence shows

defendant's only objective was to evade the officers, and firing at them during the pursuit was a means to accomplish that objective.

There is no evidence in the record to support a finding of multiple objectives. Defendant did not, for example, stay in or near the car after it crashed and try again to shoot the officers, which could indicate a second separate objective of injuring the officers.

The punishment for evasion in violation of Vehicle Code section 2800.2 is less than the punishment for assault, and so the section 2800.2 punishment is stayed.

DISPOSITION

The jury's true findings for the section 12022.53, subdivisions (b) and (c) firearm allegations are stricken. The section 12022.5, subdivision (a) enhancement added to count 6 by the trial court is also stricken. Defendant's sentence for the count 8 conspiracy conviction is reduced from the midterm of seven years to the midterm of two years. That sentence is stayed pursuant to section 654. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.